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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

2 -----X

3 UNITED STATES OF AMERICA,

4 v.

15 CR. 0093 (VEC)

5 SHELDON SILVER,

6 Defendant.

7 -----X

8 New York, N.Y.  
8 October 16, 2015  
9 2:30 p.m.

10 Before:

11 HON. VALERIE E. CAPRONI,

12 District Judge

13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the  
16 Southern District of New York

16 CARRIE COHEN

17 HOWARD S. MASTER

17 ANDREW DANIEL GOLDSTEIN

18 JAMES M. MC DONALD

18 Assistant United States Attorney

19 STROOCK & STROOCK & LAVAN LLP

20 Attorneys for Defendant

20 BY: JOEL COHEN

21 MOLOLAMKEN, LLP

22 BY: JUSTIN VAUN SHUR

22 STEVEN FRANCIS MOLO

23 ROBERT KELSEY KRY

24  
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1 (Case called)

2 THE COURT: Good afternoon. Please be seated.

3 The order that we're going to go in today is we're  
4 going to start with the motions in limine. Then we're going to  
5 talk about the defendant's that I received this morning or last  
6 night, one or other, a request for a witness list, among other  
7 things. Then we'll take up the sealed motion in limine.

8 Gentlemen of the press, heads up. You'll be excluded  
9 for that when I make findings on the record.

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16 statements, not actual statements. That's not enough  
17 information to be included with the rest of the issue.

18 THE COURT: What can you tell me?

19 MR. GOLDBERG: I think, your Honor, that number one,  
20 we could endeavor to be more specific, to the extent that the  
21 defense needs it. Some of these are issues where we thought it  
22 was important in this motion to lay out the law for the Court  
23 on state of mind evidence so that when these issues come up at  
24 trial, that there's a background, in terms of the briefing.

25 To the extent that there is a statement that we intend  
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1 to elicit as we get to a particular witness, that we could flag  
2 that for the Court in advance of that witness's testimony.

3 It could be addressed in the specifics then as opposed  
4 to potentially at the time that we filed this when we were  
5 beginning to put our proof together.

6 THE COURT: You're now two weeks before trial. So I  
7 presume your proof is more together.

8 MR. GOLDBERG: It is, your Honor.

9 THE COURT: It's not entirely together. Can you flesh  
10 out, I think, particularly the information that you want  
11 relative to Glenwood. Because I would prefer not to be ruling  
12 on that in trial.

13 I presume you would want to know for purposes of prep  
14 and they want to know for purposes of cross whether it's coming  
15 in or not. So flesh that out.

16 MR. GOLDBERG: We can do that, your Honor.

17 THE COURT: I think also the information about the  
18 doctor disproving of Weitz & Luxenberg and the contributions --  
19 if you could please flesh that out including is it documents,  
20 is it testimony, etc. That would be useful.

21 MR. GOLDBERG: We will, your Honor.

22 THE COURT: That's due on Monday. Your response is  
23 due Tuesday. We'll talk about it Wednesday.

24 MR. GOLDBERG: Thank you, your Honor.

25 THE COURT: Miles for Meso.  
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1 MR. KRY: Right. On the two documents that are  
2 actually identified, your Honor, the point here, as you alluded  
3 to back in the beginning of the hearing on campaign  
4 contributions, at the end of the day, it's Mr. Silver's mental  
5 state that counts, not the alleged victims that the government  
6 is pointing to here.

7 Then the law for extortion. They claim that it's the  
8 victim's mental state that counts, not quite. The standard for  
9 McDonough is that "The government must prove beyond a  
10 reasonable doubt that the victims were motivated to make  
11 payments as a result of the defendant's control or influence  
12 over public officials and that the defendant was aware of this  
13 motivation."

14 So a third party's undisclosed subjective speculation  
15 about whether it will cost me if he does something, absent any  
16 evidence actually tying that motivation to Mr. Silver and  
17 showing that Mr. Silver was somehow aware of that motivation,  
18 which is what the McDonough requires -- that evidence just  
19 isn't relevant.

20 So this is another topic where they have a basic

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21 foundation problem. They want to get in third parties' states  
22 of mind, but that evidence is only relevant if they can tie  
23 that to the defendant's awareness of that state of mind.

24 It's improper and very prejudicial to allow them to  
25 put in that third party's state of mind and then just let the

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1 jury speculate about whether the defendant knew that or not.

2 There's an inherent risk with this type of evidence,  
3 your Honor, that the jury is going to assume that if Mr. Taub  
4 wrote an email saying, well, this is going to cost me, then  
5 whatever that says about Dr. Taub's speculation, a jury is  
6 going to be misled into thinking that Mr. Silver must have had  
7 the same understanding of the relationship, and that's just not  
8 the law.

9 THE COURT: It seems to me that it is circumstantial  
10 evidence that a relationship is a quid pro quo relationship if  
11 one of the persons in the relationship believes that when he  
12 asks for a quid, he's going to be asked in return for a quo.

13 That is circumstantial evidence of what's in his state  
14 of mind because it's direct evidence about at least one party's  
15 understanding of the relationship. It is unusual in terms of  
16 common sense and human nature that one person in a relationship  
17 believes they are in a quid pro quo relationship and the other  
18 party does not.

19 MR. KRY: The element under the law though,  
20 your Honor, is that it's not just his -- the third party's  
21 mental state that matters. It's the third party's mental state  
22 that the defendant was aware of.

23 THE COURT: Right.

24 MR. KRY: So I don't think it's circumstantial  
25 evidence, direct evidence, any kind of evidence.

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1 THE COURT: But it is circumstantial evidence that the  
2 relationship was a quid pro quo relationship, which is part of  
3 what they have to prove, that it was a quid pro quo  
4 relationship.

5 MR. KRY: One party's speculation, unless there is  
6 some actual basis for the speculation and some reason.

7 THE COURT: He's going to testify for days I suspect  
8 about why he believed this was a quid pro quo relationship.  
9 Taub is a witness.

10 MR. KRY: Yes. If the government had that evidence,  
11 presumably they would have told us what that is. If there's  
12 evidence where this Miles for Meso email was sent on to  
13 Mr. Silver --

14 THE COURT: No, no, no. They don't have to have that.  
15 They're going to have testimony that it was a quid pro quo  
16 relationship; that Taub referred patients and Silver gave  
17 money.

18 That's what Taub is going to testify to; right?

19 MS. COHEN: That's correct, your Honor, and other  
20 benefits.

21 THE COURT: And other benefits. That establishes the  
22 fact that it was a quid pro quo relationship, and Taub's email  
23 is further evidence that not just on the stand but three years  
24 or four years or whenever it was ago, he was saying, this is a  
25 quid pro quo relationship. Every piece of evidence doesn't

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1 have to prove every fact that they have to prove.

2 MR. KRY: And I don't disagree with that, your Honor.  
3 But every piece of evidence does have to be relevant to the  
4 case. Under McDonough, a third party speculation just isn't  
5 relevant.

6 There are any number of reasons why Taub could have  
7 said that. He could have been promoting himself to the person  
8 he was corresponding with.

9 There are any number of reasons why Dr. Taub may have  
10 had that perception of the relationship. Absent some evidence  
11 actually tying that knowledge to Mr. Silver, under McDonough,  
12 the Second Circuit standard is totally clear that that's not  
13 relevant.

14 It's not a situation where you have different elements  
15 of the crime and the government can prove them one at a time.  
16 You have an element of the crime that under binding Second  
17 Circuit law just isn't relevant to the case unless the  
18 defendant is aware of it.

19 THE COURT: You're making it sound like he has to be  
20 aware that Dr. Taub thought that, as to Miles for Meso, he was  
21 going to ask for something in return.

22 MR. KRY: I think that's fair, your Honor. If they're  
23 putting in this Miles for Meso email to show that Dr. Taub  
24 believed it was going to cost him, they can only put that in if  
25 there's some evidentiary basis that Mr. Silver knew that

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1 Dr. Taub thought it was going to cost him, because absent that  
2 connection, this is pure speculation.

3 It's one third party's subjective belief of the  
4 situation. There's no basis for tying this in to Mr. Silver.  
5 As we said in the brief, Mr. Silver can't be convicted because  
6 of somebody else's guilty conscience.

7 THE COURT: That is absolutely correct.

8 MR. KRY: If we accept that premise, I think we are  
9 quite far on the way to excluding this evidence because that is  
10 what it goes to.

11 THE COURT: I completely disagree. The fact that he  
12 believes -- and the evidence is compelling evidence that he  
13 understood this to be a quid pro quo relationship.

14 Assuming they can otherwise prove that there was a  
15 quid pro quo relationship, then whether Mr. Silver knew that as  
16 to this particular act Mr. Taub was saying this is going to  
17 cost me, is neither here nor there.

18 MR. KRY: Absent evidence tying the Miles for Meso  
19 emails to Mr. Silver, I don't know how you would know that  
20 those were part of any quid pro quo relationships.

21 THE COURT: That's what Taub is going to testify.

22 MR. KRY: If Dr. Taub testifies that Mr. Silver had  
23 some reason to be aware of the motivation for thinking this is  
24 going to cost me?

25 THE COURT: No. You're tying this evidence up in a  
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1 way, one, that it is not how people operate, certainly not how  
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2 quid pro quo relationships operate. That's not what the law  
3 is. It's circumstantial evidence that the men had a quid pro  
4 quo relationship.

5 So, when he asked for something, he was asking for  
6 him, for the defendant, to act in his official capacity, to  
7 help him out on things. He totally understood that he would do  
8 it, but it would cost me, because it's a quid pro quo  
9 relationship.

10 MR. KRY: I don't think it makes sense to define quid  
11 pro quo relationships in the abstract. If the theory is that  
12 there was a quid pro quo relationship with respect to Miles for  
13 Meso, then they need to show that there was not only a  
14 subjective belief by Dr. Taub that this was going to cost him  
15 but that somehow Mr. Silver was aware of that motivation.

16 That's what McDonough says. That's the government's  
17 case. We all agree that's what the standard is. If they want  
18 to try and put on evidence of some other transactions which  
19 they say are quid pro quos that somehow justifies letting in  
20 these completely different set of emails about Miles for Meso  
21 just because Dr. Taub had an email. Absence of evidence that  
22 Mr. Silver was aware of Dr. Taub's understanding and  
23 subjective, undisclosed perception of what he was doing here --  
24 this evidence just isn't relevant under McDonough, and it's  
25 also highly prejudicial.

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1 THE COURT: I disagree with your reading of McDonough.  
2 So that email is admissible. We need more on this one before  
3 we can resolve the other elements of it.

4 We've talked about what I have as number 7, which is  
5 the use of letterheads for real estate taxes. I think the  
6 motion relative to the Hofstra Law School opinion is moot?

7 MS. COHEN: Your Honor, I haven't been given expert  
8 disclosure. So I'm not sure.

9 THE COURT: So you think they might be wanting to call  
10 some other expert to testify to the same thing?

11 MS. COHEN: You had asked them to notify us by today,  
12 and they have not done so.

13 THE COURT: I presume that means they don't have any  
14 experts.

15 MR. MOLO: Actually, Judge, you didn't ask us to  
16 notify them by today.

17 THE COURT: As soon as possible I think.

18 MR. MOLO: Exactly. We've written them telling them  
19 that by the time of the pretrial conference, we intend -- it's  
20 our intention now -- to give them expert disclosure.

21 THE COURT: Are you going to try to put on a witness  
22 who is going to testify about whether Weitz & Luxenberg's  
23 arrangement was ethical?

24 MR. MOLO: At this point in time, that is not my  
25 intention.

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1 THE COURT: Good. Let me know if that changes because  
2 I do not believe I would admit it.

3 You want to put in 40-year-old conduct of Dr. I.

4 MR. MOLO: Not exactly. My partner, Mr. Shur.

5 MR. SHUR: Good afternoon, Judge. I believe it's the  
6 government's motion, but I'm happy to address it.